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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72–1190

IN THE MATTER OF THE PETITION OF
MICHAEL ALARID, JR., BENJAMIN CHAVEZ, JR.,
ROLAND TOVAR, AND JOSE N. URANGA, JR.

BRIEF IN OPPOSITION
TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

In the original proceeding before the New Mexico Supreme Court the New Mexico Board of Bar Examiners (the Respondent) was directed by that court to respond to the petition and to appear at the hearing in opposition to it. Having complied with this direction in the proceeding below, it is appropriate and proper that the Respondent should appear before the United States Supreme Court (this Court) in support of the December 1, 1972 Memorandum Decision and Order of the New Mexico court and in opposition to the Petition for Writ of Certiorari to that court.

REASONS FOR DENYING THE WRIT

In submitting definitive reasons for denying the Petition for a Writ of Certiorari, the Respondent is somewhat handicapped by the fact that the Petitioners do not appear to have stated any reasons, supported by federal question decisions of this Court, or any other for that matter, as to why the petition should be granted. At best, the "reasons" profferred by the Petitioners suggest (1) that this Court should determine whether the 67 percent minimum passing score established by the Respondent for its August, 1972 bar examination *in fact* constitutes the basic, minimum indication of professional competence or proficiency required to practice law in the state, and (2) that this Court should declare a uniform, minimum standard of demonstrated proficiency for the nation as a whole because of the increasing frequency with which disappointed applicants for admission are currently challenging bar examination objectives, procedures and consequences throughout the United States. In search of *hope*, the Petitioners would scatter the other contents of Pandora's box upon the bench of this Court.

Despite the failure of the Petitioners to express or explain any valid reasons why the writ should be granted, the Respondent will endeavor to demonstrate why it should not.

I. The Petition Fails to Demonstrate Any Denial of Due Process or Equal Protection in the Scope or Contents of the Bar Examination.

In its December 1, 1972 Memorandum Decision,[1] the New Mexico court expressed its basic functions and responsibilities, as well as those of the Respondent, as to the matter before it with the following comment:[2]

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1. The unreported December 1, 1972 Memorandum Decision of the New Mexico Supreme Court is quoted in its entirety as Appendix B to the Petition for a Writ of Certiorari, pp. ix - xiii.
2. *Id.*, pp. ix - x.

> In the supervision of bar examinations the Court has a dual responsibility. The first, and most important of these, is its responsibility to assure the people of New Mexico that those admitted to practice law in this State are qualified in every respect to discharge their professional responsibilities, and, insofar as reasonably possible, to protect the public against injustices which often result from representation by incompetent attorneys. The second of these is its responsibility to insure that examinations are conducted fairly and impartially in all respects as to all who are examined.

Similarly, this Court has held that a state "has a legitimate interest in determining whether an applicant has the qualities of character and professional competence requisite to the practice of law," *Baird v. State Bar of Arizona*, 401 U.S. 1, 7 (1970); that, while a "State cannot exclude a person from the practice of law . . . in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment," the "State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-9 (1956).

The Petition does not contain any *express* claim that there is no rational connection between the scope and contents of the August, 1972 bar examination and the qualifications of an examinee to practice law in New Mexico or the determination of such qualifications. Moreover, the Petitioners offered no evidence whatever tending to suggest that a rational connection did not exist. Nevertheless this *implied* claim was made by the Petitioners and met by the Respondent.[3]

In New Mexico, the qualifications and requirements for admission to the state bar, as well as the method of determining

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3. See colloquy between the New Mexico Supreme Court and Respondent's attorney (Appendix A, pp. 8a - 10a, *infra*).

the same, are prescribed by the State Supreme Court's rules.[4] All applicants for admission to the bar, excepting members of the New Mexico law school faculty, in the discretion of the Respondent, are required to take and pass a written examination prepared by the Respondent in accordance with the rules.[5] While it is authorized to utilize the services of expert draftsmen or of the National Conference of Bar Examiners in preparing examination questions, the Respondent is obliged to approve each element of every question to be asked.[6] The major portion of the questions are required to be in the form of hypothetical fact problems requiring essay answers, but no peculiar or special knowledge of local law.[7] The "basic and fundamental subjects" upon which the examinees are to be tested are prescribed by the rules.[8] Finally, it is specified that:[9]

> The bar examination is for the purpose of testing the applicant's professional competence to practice law, including the ability to reason logically, to analyze accurately the problems presented to him, and to demonstrate a thorough knowledge of the fundamental principles of law and professional ethics and their application. The examination shall not be designed primarily for the purpose of testing information, memory or experience.

Respecting the subjects of the bar examination specified by the rules,[10] Robert Taichert, a member of the Respondent for the past four years[11] who graduated from Harvard Law School and has practiced law in New Mexico for 16 years, and who the

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4. New Mexico Rules Governing Bar Examiners, Bar Examinations and Admission to the Bar, effective July 12, 1972. (These Rules are quoted in material part as Appendix A to the Petition for Writ of Certiorari, pp. i - viii.)
5. *Id.*, Rule 12 (Petition, Appendix A, p. iii).
6. *Id.*, Rule 20 (Petition, Appendix A, p. vi).
7. *Id.*, Rule 19 (Petition, Appendix A, p. v).
8. *Id.*, Rule 18 (Petition, Appendix A, p. iv - v).
9. *Id.*, Rule 17 (Petition, Appendix A, p. iv).
10. *Supra*, Note 8.
11. Appendix A, p. 7a, *infra*. Mr. Taichert has been a member of the Board of Bar Examiners for approximately four years and has graded bar examinations in New Mexico for the preceding nine years. *Ibid.*

New Mexico court accepted as an expert on the subject,[12] testified that they are the subjects most commonly taught in law schools and included in the bar examinations of other states[13] and that knowledge of them is essential and fundamental to the practice of law in New Mexico – i.e., that knowledge of these subjects is a necessary "job-related" skill of a practicing New Mexico attorney.[14] Further, he stated that the August, 1972 bar examination covered these subjects.[15]

Respecting the prescribed purpose of the examination – namely, to test each applicant's "ability to reason logically, to analyze accurately the problems presented to him, and to demonstrate a thorough knowledge of the fundamental principles of law and professional ethics and their application,"[16] Mr. Taichert testified that the skills are related to the ability and competence of anyone to practice law in New Mexico or elsewhere, as "is the ability to accurately state issues orally and in writing and to communicate facts and legal concepts *in the language in which a legal system is conducted.*"[17] He also stated that the August, 1972 examination tested or measured the ability of the applicants to analyze fact situations,[18] pointing out, as well, that each question included legal issues that were perceptible to and could be answered by anyone knowledgeable in the law who had the ability to analyze, to reach a rational conclusion and to express himself adequately.[19]

The source of the August, 1972 examination questions, as well as the model answers thereto, according to William E. Bondurant, the chairman of the Respondent[20] was the National Conference of Bar Examiners.[21] Essentially, the examination

12. Appendix A, p. 11a, *infra.*
13. Appendix A, p. 8a, *infra.*
14. Appendix A, p. 8a, *infra.*
15. Appendix A, p. 12a, *infra.*
16. *Supra,* Note 4, Rule 17 (Petition, Appendix A, p. iv).
17. Appendix A, pp. 10a - 12a, *infra.*
18. Appendix A, p. 12a, *infra.*
19. Appendix A, p. 12a, *infra.*
20. Appendix A, p. 2a, *infra.*
21. Appendix A, p. 3a, *infra.*

was the same as those given to the examinees in law school, except the questions tended to be shorter and probably simpler.[22]

The Petitioners' sole attack on the scope and contents of the August, 1972 examination consisted of their attorney's inquiry, put to Mr. Taichert, as to whether it had been "validated by any professional testing firm."[23] In the course of his subsequent colloquy with the New Mexico court, however, counsel was unable to suggest whether there was any such "professional testing firm" in existence or what other states have their examinations so "validated."[24]

It is respectfully submitted that the foregoing clearly demonstrated a rational connection between the scope and contents of the examination and the required skills of he who aspires to the practice of law; accordingly, that the scope and contents of the examination did not contravene the due process or equal protection clauses of the Fourteenth Amendment to the Constitution.

II. The Petition Fails to Demonstrate Any Denial of Due Process or Equal Protection in the Administration or Grading of the Bar Examination.

The Bar Examination Rules of the New Mexico Supreme Court require that each examinee be assigned a number to be placed on his examination papers in place of his name, that only the Chief Justice of the court, or his designee, shall have access to the record of names and numbers until after all papers have been graded and passed or failed, and that the graders shall not know the names of the examinees.[25] In this connection, the New Mexico court found that "the rule relating to non-identity was meticulously adhered to by the Board and other examiners."[26] The Petition asserts no claim to the contrary.

22. Appendix A, p. 12a, *infra.*
23. Appendix A, p. 16a, *infra.*
24. Appendix A, pp. 17a - 18a, *infra.*
25. *Supra,* Note 4, Rule 21(a) (Petition, Appendix A, p. vi).
26. *Supra,* Note 1 (Petition, Appendix B, p. xii; see also pp. x - xi.)

The rules provide that the members of the Respondent, who are appointed directly by the New Mexico Supreme Court,[27] "shall be practicing attorneys with scholarly attainments and an affirmative interest in legal education and requirements for admission to the Bar."[28] It is also specified that alternative graders shall meet the same qualifications and that they shall be appointed by the court,[29] as they were.[30] Moreover, each is required to have a minimum of five years of practice.[31] The Petitioners do not appear to quarrel with the qualifications of the bar examiners or the other graders.

In order to assure maximum fairness and uniformity in grading, the rules require the Respondent to prescribe standards to be used by all graders and, to the extent possible, to require that all answers to a particular question shall be graded by the same grader,[32] which was done in connection with the August, 1972 examination.[33]

The rules require that examinees be given sufficient time in answering the questions to permit careful analysis and well-reasoned answers.[34] The evidence disclosed that the examinees were given 20 hours within which to answer 30 questions in connection with the August, 1972 examination.[35]

Concerning the mechanics of the grading, Mr. Taichert testified that, despite the essay character of the examination questions and answers, the grading was essentially objective in the sense that an examinee who merely perceived and expressed

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27. *Supra*, Note 4, Rule 1 (Petition, Appendix A, p. i).
28. *Supra*, Note 4, Rule 2.
29. *Supra*, Note 4, Rule 21(c) (Petition, Appendix A, p. vi).
30. Appendix A, pp. 3a - 4a, *infra*.
31. Appendix A, p. 3a, *infra*.
32. *Supra*, Note 4, Rule 21(b) (Petition, Appendix A, p. vi).
33. Appendix A, p. 15a, *infra*.
34. *Supra*, Note 4, Rule 19 (Petition, Appendix A, p. v).
35. Appendix A, pp. 12a - 13a, *infra*. This testimony also indicated that prior to 1964 examinees had 16 hours to answer 40 questions and, from 1964 until the August, 1972 examination, 20 hours for 40 questions. *Ibid.*

67 percent of the salient legal issues with reasonable clarity received a passing grade for his answers even if he failed to apply fundamental legal principles to their resolution.[36]

Respecting the foregoing, the New Mexico court found that "it conclusively appears . . . that the grading of answers to the examination questions was conducted in a manner as fair and reasonable as is possible in an examination in which judgment is called for by the graders."[37] And it is respectfully submitted that the record below and the Petition here fail to demonstrate any denial of due process or equal protection in the administration or grading of the August, 1972 bar examination.

III. The Petition Fails to Demonstrate Any Denial of Due Process or Equal Protection in the Establishment of the Minimum Passing Score or of the Minimum Regrading Score for the Bar Examination.

It is toward this point that Petitioners direct their attack, such as it is. Essentially, they quarrel with the propositions (1) that the Respondent may defer establishing the minimum, passing examination score until after the examination has been given and the answers graded, (2) that the Respondent may establish such score by a "collective value judgment" and (3) that the Respondent may establish a lower minimum, passing score for experienced attorneys who have been admitted to the bar and been practicing for at least five years elsewhere. Respecting this curious attack, we note, on the one hand, that the Petitioners fail to cite any authorities in conflict with these propositions, whether from the decisions of this Court or others, and, on the other, that they neglect to indicate how they may have been injured or discriminated against by the practices complained of.

It is not suggested nor legitimate to assume that the Petitioners would have done better on the examination had the

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36. Appendix A, pp. 14a - 15a, *infra.*
37. *Supra,* Note 1 (Petition, Appendix B, p. xii).

minimum passing score for it been established, and they informed of that score, before they took it. It is not suggested why the "process" of prior establishment and announcement of the minimum passing score was "due" to the Petitioners nor how they have not been treated "equally." Having just completed three years of law school and having suffered the all too frequent onslaught of similar examinations, one would expect that the Petitioners realized they were obliged to do as well as possible on the bar examination, not merely to aim at an announced or assumed minimum, passing score.

It is conceded that the minimum, passing score was not established by the Respondent until immediately after the examination had been given and all answers graded. Accordingly, the Respondent knew what grades had been given but not the name, as distinguished from the assigned number, of any person who had received a particular grade.[38]

Messrs. Bondurant and Taichert explained why this decision was delayed. It was not delayed for the purpose of establishing a so-called "curve";[39] rather, it was done in order to permit the members of the Respondent to assess the overall degree of difficulty of the examination on the basis of how well the entire group of examinees has actually done and to thereby make an appropriate adjustment for that degree of difficulty.[40] While due process and equal protection have no apparent connection with the practice, it is respectfully suggested that the delay is fairer to all concerned than would be the arbitrary establishment of a minimum, passing grade before the examination was given. Obviously, the latter practice could conceivably result in total failure.

Considering its source, we are amused and, considering the ramifications, bemused by the Petitioners' assertion that "a 'collective value judgment' is not a standard by which to measure competence."[41] It so happens that both authors of the

38. Appendix A, p. 6a, *infra*.
39. Appendix A, p. 4a, *infra*.
40. Appendix A, pp. 7a, 14a - 16a, *infra*.
41. Petition, p. 11.

Petition are law school professors who, presumably and at least semi-annually, measure the competence of and grade their respective students by a lonely exercise of value judgment that does not even have the advantage of being collective. Moreover, the assertion challenges the very foundation of the method by which this Court, not to mention all other appellate courts, the houses of Congress and the state legislatures, and the nation as a whole, arrive at decisions as to the myriad problems that besiege us. And lastly, we observe that the Petitioners' critical audacity is not matched by their invention, for they fail to suggest any alternative or substitute for the Respondent's "collective value judgment," unless the Petitioners' attorney meant to imply that a "professional testing firm"[42] can perform the necessary alchemy by some new and different legerdemain.

However that may be, the Bar Examination Rules of the New Mexico Supreme Court do not specify a minimum, passing score. As earlier indicated, they do establish the purpose of the examination, its scope and subjects, the skills to be demonstrated and measured, and the method of demonstration and measurement. Moreover, they require the Respondent to reappraise all "borderline" answer papers to assure fairness, but leave to the Respondent's sound discretion the matter of setting both the minimum, passing score and the "borderline" range. Mr. Bondurant stated that both were established by an informed "collective value judgment" process,[43] and Mr. Taichert, describing the process somewhat differently, explained that the members of the Respondent viewed the compiled results of the examination in light of its degree of difficutly and exercised their best judgment to determine the point below which an applicant had failed to demonstrate sufficient competence to practice law and to be turned "loose on the public as lawyers."[44]

Lastly, we respond to the claim that setting a minimum, passing score of 65.83 percent for the "experienced attorneys" as distinguished from 67 percent for the recent law school

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42. *Supra*, Note 23.
43. Appendix A, pp. 1a - 2a, 5a, *infra*.
44. Appendix A, pp. 7a, 14a - 15a, *infra*.

graduates, somehow denies due process and equal protection of the laws to the Petitioners. As an initial observation, we note that the Petitioners would not be aided by the lower, minimum passing score since the highest any of them received was 65.33 percent.[45]

Be that as it may, the Petitioners have cited no authority in support of their contention, and we are not aware of any decision of this Court, or any other, holding or suggesting that in the establishment of bar admission requirements, including the required minimum examination grade or even whether an examination need be taken, the proper authorities may not impose different requirements on different classes or persons; that it cannot distinguish between classes or persons between whom there are very real and significant differences. And in this connection, we note that Rule 13[46] describes a class of persons who are very different from those with whom the Petitioners share membership and that the rule specifies a number of means by which the "experienced attorneys" shall demonstrate their qualifications and proficiency to the Respondent that are not possible or practicable in the case of inexperienced, recent law school graduates.

In the last analysis, it would appear that the Petitioners' complaints here are based upon nothing more nor less than the suggestion that the establishment of any minimum, passing score at a point above the grades they received on the examination, or the establishment of any "borderline" range of reappraisal that does not reach them, constitutes a denial of due process and equal protection to them. It is submitted that this assertion is ridiculous and that the Petition, as well as the record below, fail to demonstrate any denial of due process or equal protection in the establishment of the minimum passing score or the minimum regrading score for the August, 1972 bar examination.

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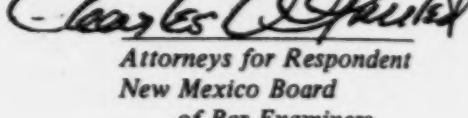
45. Petition, p. 3.
46. *Supra*, Note 4, Rule 13 (Petition, Appendix A, pp. iii - iv).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

OLMSTED & COHEN



Attorneys for Respondent
New Mexico Board
of Bar Examiners

APPENDIX A

EXCERPTS OF TESTIMONY OF W. E. BONDURANT AND ROBERT D. TAICHERT

WITNESS: W. E. BONDURANT

DIRECT EXAMINATION (Commenced at Tr. 100*)

(Material omitted)

Q (By MARIO OBLEDO, Petitioners' attorney.) How did you arrive at the figure 67, Mr. Bondurant?

A Anyone who had a 70 was automatically passed. From then it was simply a question of a collective value judgment. That is about all I can tell you.

Q Did anyone make a motion that the passing grade be 68?

A Yes.

JUSTICE MONTOYA: 68 or 67?

MR. OBLEDO: No, 68.

A As I recall, it went to 70, 69, 68, and you would get arguments at each grade.

Q And then a motion was made for a passing grade of 67?

A Correct.

Q And that was the one that was acted upon?

A Correct.

Q Were any particular reasons given as to why 69 was not chosen?

Tr. 109

A No, sir.

Q Or 68?

A No.

Q Any reasons given for the figure 67?

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* The page numbers of the transcript of the hearing held before the New Mexico Supreme Court on November 27 and 28, 1972 are indicated by the reference "Tr." followed by the page number.

A No, not that I know of.

Q Do you recall what the votes were for the grade 69?

A I do not.

Q Or 68?

A I do not.

Tr. 110

(Material omitted)

Q Well, was there any particular reason for having the passing grade at 67 and then borderline cases for the extra percentage point, or did anyone raise the possibility of having the passing grade at 66 period?

A The reason for it again, in my opinion, is that it was not (sic) collective valued judgment. We are not law school profs and we were trying to be just and create a leeway in there that would do justice to the applicants.

Tr. 112

(Material omitted)

CROSS-EXAMINATION (Commenced at Tr. 126)

Q (By CHARLES D. OLMSTED, Respondent's attorney.) Mr. Bondurant, you testified earlier you have been Chairman of the Board of Bar Examiners for about the last three years, is that correct?

A Yes.

Q And you have been on the Board for approximately ten years.

A Yes, sir.

Q You are familiar with the method by which the examination questions are selected?

A Yes, sir.

Q How was that done in this instance with respect to the August, 1972 exam?

A Mr. Koch made the preliminary selection of the

Tr. 126

question and we obtained those questions from the National Conference in Chicago. And I think he selected 30 or 40 questions and then Mr. Taichert and Mr. Moore made the final selection of the final 30 questions.

Q Now, when you say you obtained the questions, you also obtained model answers to those questions from the National Conference?

A Yes, sir.

Tr. 127

(Material omitted)

Q Now, with respect to the selection of the examiners themselves, or the graders, other than the members of the Board, when and how did this occur?

A Several years ago when the August exam had so many more applicants we selected a panel of extra graders who we thought were respected, experienced, competent lawyers from all areas of New Mexico, and obtained the Supreme Court's consent to the list.

Q What criteria did you use in selecting the alternative graders, the alternate graders?

A The same criteria as prescribed by the rules, their integrity, the fact that they are unbiased, cool judgment, horse sense, practical lawyers.

(WHEREUPON, Board Exhibit B marked for identification)

Q How many years of practice did you require?

Tr. 128

A A minute (sic) of five.

Q A minimum of five years practice for each alternate grader?

A Yes.

Q I hand you a document marked for identification as Board Exhibit B and ask you to identify that.

A It is the Order that designated the extra graders for the August 21st Bar exam.

Q 1972?

A Correct.

Q This is an Order of the Supreme Court?

A Yes.

Tr. 129

(Material omitted)

JUDGE HERNANDEZ: Mr. Bondurant, I would like to ask you a question in that regard. In other words, there was no curve, there were no instructions given as to grading on a curve that a given percentage would be

Tr. 134

failed and a given percentage would be passing?

THE WITNESS: No, sir. Your Honor, the written instructions do say this, and it could get on the idea of a curve, but the suggestions state that they grade ten papers and see how the boys are running before they turn them loose because they might want to revise their grade on the first ten papers and get the feel of the way the examination runs. It is difficult to explain it to you unless you have done it, but you get a feel of the question and you have a stream of papers coming across you, but those written instructions do make that suggestion that the first ten papers they grade to not release, to hold it, because at that point you might want to revise your grading system.

JUDGE HERNANDEZ: This is not for the purposes of arriving at some mythical curve?

THE WITNESS: No, sir, it is not.

Tr. 135

(Material omitted)

Q Now, with respect to your deliberations on the late afternoon of August 24th, at the time the Board set a passing grade, am I correct in assuming that all papers had been graded?

A Correct.

Q You had the numerical scores by section numbers and totaling for each applicant?

A Yes.

Q Now, you have explained a little earlier in the course of direct examination some of the mechanics of how finally you arrived at 67 or 66.99. What factors are discussed by the Board in the course of these deliberations and what factors were actually considered by the members of the Board as indicated in your discussions as to precisely where this grade was going to be set and why?

A Well, I think that it was a valued judgment of the Board based on how difficult we thought the examination was; that whether or not this boy was legally competent to represent the people of New Mexico to be turned loose on the public. This may sound ambiguous, but that is about the best explanation I can make of it.

Tr. 136

Q What percentage do you start at in considering; in other words, does the Board start at a certain percentage and see whether they can get concurrence on that percentage as the passing grade; if it can't, does it go to another one?

A This is correct, and as I said, a grade of 70 always passes you, any my recollection is, and it is only a recollection, but I think it is accurate, the last several times a grade of 68 or lower passed you (sic) – was passing.

Tr. 137

(Material omitted)

Q Now, can you tell us, Mr. Bondurant, what matters the Board discussed and considered in setting borderline as stated in Rule 21(d) at this rating of within one percentage point below 66.99?

A All I can say is it was again a collective valued judgment. We know that we are not law school profs, we don't have that expertise, we have the expertise of, I think, practicing lawyers,

experienced lawyers, and we wanted to give them the benefit of the doubt by putting a leeway in.

Tr. 138

(Material omitted)

Q Mr. Bondurant, you testified earlier you have been on the Board approximately ten years, and I take it that would mean you have participated in grading approximately 20

Tr. 141

Bar examinations in the State of New Mexico?

A At least 18. I was absent a few times.

Q During this entire period of time, have you ever seen an occasion where the secrecy rule was violated?

A I positively have not. We have never known the identity until our number pass-fail was connected by the Clerk with her list of names; never.

Tr. 142

(Material omitted)

WITNESS: ROBERT D. TAICHERT

DIRECT EXAMINATION (Commenced at Tr. 162)

(Material omitted)

CROSS-EXAMINATION (Commenced at Tr. 177)

Q (By CHARLES D. OLMSTED, Respondent's attorney.) Mr. Taichert, you were asked on direct examination about the Board's determination on August 24th as to what would be the passing grade.

A Yes.

Q What factors did you and the others consider in setting this grade?

A First, the 18 graders all knew that 70 was a passing answer on any question. We, therefore, had the composite judgment of 18 experienced lawyers, each taking a small piece of the examination on the value of the work on that paper of each examinee. We looked at the overall averages of these people and exercised our best judgment as to the points below which we would have violated our duty to this Court and to the people of New Mexico by recommending the admission of the applicants. It is a matter of judgment

Tr. 177

that we exercise very carefully as best we know how. We look to see how they have done on the sections, did they generally do well and just bomb one section; did they do uniformly poorly; did they do exceptionally well in areas? We were simply trying to protect the public from the incompetency, and we exercised that judgment as Mr. Bondurant said in a composite way until we arrived at a point where we were agreed that people who have not reached that point have failed to demonstrate sufficient competence to warrant turning them loose on the public as lawyers.

Q How long have you been a member of the Board of Bar Examiners?

A Approximately four years.

Q Had you graded the Bar examinations prior to that time?

A For about five years.

Q So all total (sic) you have been grading Bar examinations for –

A About nine years.

Tr. 178

(Material omitted)

WITNESS: ROBERT D. TAICHERT

DIRECT EXAMINATION (Commenced at Tr. 202)

Q (By CHARLES D. OLMSTED, Respondent's attorney.) Mr. Taichert, you have in your hand a copy of the rules for the Board of Bar Examiners promulgated by the Supreme Court?

A Yes, sir, those effective July 12, 1972.

Q Now, referring you to Rule 18, Mr. Taichert, wherein are listed named some 20 subjects, legal subjects, in your opinion and in your experience, are these legal subjects named in Rule 18 related to the practice of law in New Mexico

Tr. 202

and elsewhere?

A Without any question, Mr. Olmsted. Knowledge of these subjects is fundamental to the competence of a lawyer to practice in this or any other state with the sole exception of the category of basic principles of New Mexico community property law. This is one area that New Mexico has peculiar rules that we expect the applicants to know.

Q In other words, these subjects are job-related to your job and my job?

A They are related to the job of all lawyers, all judges, all who would practice in our profession.

(Material omitted)

Q Insofar as that general knowledge is concerned, are all of these subjects named in Rule 18 taught at the University of New Mexico Law School?

A I would hope so, they should be. I should add, Mr. Olmsted, these are the subjects most commonly examined upon in most other states according to statistics of the National Conference of Bar Examiners, and they are the subjects most commonly taught.

JUSTICE STEPHENSON: This does not seem

Tr. 203

responsive to the petitioners' case. Are you directing this towards the amicus brief?

MR. OLMSTED: Precisely.

JUSTICE STEPHENSON: Well, amicus takes the cases, it finds – We're not going to expand the issues by the filing of a brief.

MR. OLMSTED: Let me point out, Your Honor, there is at least the allegation, whether there is any proof of it or not, that somehow or other this whole Bar examination system is violative of due process in some regard. I concede there have been some United States Supreme Court decisions related to testing of applicants for various types of positions, various types of licensing, and that sort of thing, which tend to indicate that there is some sort of burden upon the examining authority to establish that the examination given, the subjects covered and the like, are job related. Furthermore, that the test is designed so as to determine or measure job related skills.

JUSTICE STEPHENSON: Is that included in the issues presented by this petition?

MR. OLMSTED: There is at least the allegation in the petition, Your Honor, that, or the implication if

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not the expressed allegation, that the whole August, 1972 Bar examination was somehow or other violative of due process, which I think probably is intended to invoke the authorities discussed in the amicus brief. I concede, at least it seems to me, there has been no affirmative proof of any of these things, but I am confronted with a case which may very likely go to a higher tribunal than this one, and with this thought in mind I was going to elicit certain testimony from Mr. Taichert to respond to the implication, if not the opposing proof.

JUSTICE OMAN: Well, is there any implication or any implication or any positive proof of this at all? I have been sitting here listening.

MR. OLMSTED: I don't think there is, Your Honor, but I might be confronted with a situation in the United States

Supreme Court of being told it was my burden to prove that it was not violative.

JUSTICE MONTOYA: That's what the allegations in the amicus brief say.

MR. OLMSTED: That's what the allegations in the amicus brief say, Your Honor, yes.

JUSTICE MONTOYA: They concede the Bar Examiners had no discriminatory motive. I think the

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effect is the thing that is relevant and they argued once the discriminatory impact has been established and proven that the persons administering the exam have the burden of coming forward and demonstrating that the exam is job related. Is that what you are getting to now?

JUSTICE OMAN: I, personally, do not think the amicus can raise issues in this Court.

MR. OLMSTED: I agree.

JUSTICE OMAN: He is not a party to it and he can not raise issues in this Court. Any issues that have not been tried in this Court is not for the amicus to try to enlarge it. This is my view, I don't know how the rest of you feel. That is consistent with our rule forever in this court.

JUSTICE McMANUS: Well, we have already stated that we meant no expansion of the issues by amicus, but we will allow you tp proceed if you can do it –

MR. OLMSTED: Expeditiously.

JUSTICE McMANUS: – expeditiously. That is a beautiful word.

Q Referring you to Rule 17, Mr. Taichert, I ask you are the abilities to analyze a fact situation and to distill

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from them the significant legal issues related to the practice of law in New Mexico and elsewhere in your experience?

MR. OBLEDO: Your Honor, if it please the Court, I am going to object to this line of questioning because the predicate has not been laid to qualify Mr. Taichert as an expert Bar Examiner or as an expert in the Bar examinations in this state or in this country.

JUSTICE MONTOYA: He was appointed by this Court, Mr. Obledo, to serve in that capacity.

MR. OBLEDO: As a Board Examiner, but that doesn't necessarily make him, Your Honor, an expert in Bar examinations. In fact, that may be one reason why we are in this particular case now.

JUSTICE McMANUS: We'll deny your motion. Go ahead and do it as rapidly as you can.

Q Well, for the record, Mr. Taichert, how long have you been practicing law in New Mexico?

A Sixteen years.

Q Where did you graduate from law school?

A Harvard.

JUSTICE McMANUS: I think we have agreed that we will accept Mr. Taichert's qualifications in this regard.

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Q Did you answer the last question or was the objection made first?

A No, I waited for Mr. Obledo's objection.

Q Do you recall the question?

A The answer obviously is yes. The capacity of an applicant to analyze a fact situation to see legal issues, to demonstrate, first to have and second to demonstrate knowledge of fundamental principles of law and to be able to organize and express a rational answer to a given problem are all related to competence to practice law.

Q Fine, you have just answered the next five questions. Is the ability to accurately state issues orally and in writing and to communicate facts and legal concepts in the language in

which a legal system is conducted related to the practice of law within that system?

A Yes, sir.

Q Now, specifically with reference to the Bar examination given in August of 1972, Mr. Taichert, in your opinion as a practicing attorney and as a man who has had considerable experience with a Bar examination, did that examination test or measure the ability of each examinee to analyze fact situations?

A Yes, sir. I believe, if I may go a little further

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I can tell you what else I believe the examination tested. As was testified yesterday, Mr. Koch made the preliminary selection of questions. Russell Moore and I made the final selection of questions. We read every question and every model answer before the examination was finally put together. Each one of those questions was designed to raise quite specific legal issues which any applicant competent to practice law should have been able to recognize. The subjects were from the 20 listed in Rule 18. Each question raised those issues in a way that they could be recognized by someone who had the knowledge of the law, the ability to analyze, the abilities to come to a rational conclusion, and the ability to express himself adequately to show that he knew what the issues were, and all of these, we believe, are a rational measure of a lawyer's competency. It is the same kind of examination that is given in law school for three years, there is nothing new about it to applicants for admission to the Bar except that on balance our questions are shorter and probably simpler than law school questions, and they are certainly graded less brutually than law school questions.

Q I believe your testimony yesterday indicated you had increased the allowable time within which to answer

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questions by approximately one-third, is that correct?

A Yes, sir. There is one loose end hanging from yesterday. Approximately 1964, by reason of complaints from unsuccessful

applicants the Board changed the examination from being a two day, eight hour per day affair, to be two and a half days, and increasing the answer time from twenty minutes a question to 30 minutes a question. As an experiment in August –

Q Before you go any further, prior to 1964 it was 40 questions and 16 hours?

A Yes, sir, that is my best recollection.

Q And from '64 up until August of 1972 it was 40 questions in 20 hours?

A Yes, sir.

Q And as with respect to the August, 1972 Bar examination it became 30 questions in 20 hours.

A Yes, sir.

Q Was this in response to any kind of complaint or criticism from examinees?

A Yes. It wasn't a direct cause and effect. We wanted to experiment to see if the performance on the examination would be materially aided by giving the applicants an additional ten minutes per question.

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Q Was it?

A I think not. There were more high grades. The distribution of failing in low grades was about as in the past. I am not a good enough mathematician to know what significance, if any, is in that.

Q So, your statement then is that this Bar examination given in August tested the examinees' ability to perceive and express significant facts and legal issues contained in the fact situation, am I correct?

A Yes, sir. To the best of my knowledge, all of the graders will give a passing grade of 70 on a question if the applicant sees and expresses with reasonable clarity what the issues in that question are.

Q Without even going further and applying fundamental principles to those issues he would still get a passing grade?

A That is the general idea. In short, we don't put a premium on having the "right answer" in cases where there is clearly a right answer. Knowing what principles of law and being able to see them and demonstrate that they know what the problem is.

Q In this connection, and in your opinion, Mr. Taichert, in view of what you have already stated, and even

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though this examination is a so-called essay type examination, is the grading of it an objective or a subjective exercise?

A It is primarily objective. I think it would be less than honest to say that there are not some subjective elements. Some people express themselves well and some poorly, but basically and over the past examination you need to see the issues on slightly more than two-thirds of the questions. If a fellow can find 67 percent of the issues he can pass the test and those issues are objective. They raise well established fundamental principles, and the grading is therefore primarily objective.

Q The principles, the fundamental legal principles which the grader is looking for in the answer that he grades are these fundamental principles that are taught in all accredited law schools?

A Well, they should be, Mr. Olmsted. We hope that they are.

Q Is this one of the reasons you are conducting the examination to determine whether they are?

A Yes, sir.

Q Now, with respect to the decision on August 24, 1972, setting a passing grade at 67 percent or 66.99 percent,

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would you tell the Court what factors were considered by the Board of Bar Examiners in establishing this passing standard?

A Well, each grader had evaluated the question, I should say the answer, of each applicant to the question that he graded in terms of anlyzing, seeing the legal issues and making a noise like a lawyer how to treat with a problem presented in the

question. The compilation of the results of the grades of all the questions led to certain averages. We looked at the grades of the applicants on the various sections and used our best judgment to determine the point below which the applicants had failed to demonstrate sufficient competence to practice law to warrant recommending their admission to the Bar of this state.

Q Now, with regard to the standard of grading, I believe prior testimony has indicated that one person graded every answer of every examinee to the same question.

A Yes, sir, invariably.

Q What is the purpose of doing this?

A Well, for one thing –

Q Aside from it being required under the rule?

A – the rule requires it. The practical reason is that no two people sets answers the same way. This Board and

Tr. 213

others have had experiments over the years of trying to use more than one grader, and in the huge population centers like California and New York they do use multiple graders. They get wide variation. Our experience here has been that no two people respond identically, and rather than to hazard a variation, probably fairly narrow, within five or ten points per question, but rather than to hazard any variation in this state one grader grades all the papers on the specific question.

Q So to summarize, is this to get a uniform standard of grading on each question?

A Yes, sir, and the teams I might say serve the purpose of giving the grader ample time to do so.

Q And then once you have determined the total percentage grade of every applicant, then is when the Board sets the passing score, is that right?

A Yes, sir.

Q So would it be safe to say that there is some adjustment

by the Board relative to its concept of the degree of difficulty of the examination?

A Absolutely.

MR. OLMSTED: I have no further questions.

JUSTICE McMANUS: Mr. Obledo.

tr. 214

CROSS-EXAMINATION (Commenced at Tr.214)

Q (By MARIO OBLEDO, Petitioners' attorney.) Mr. Taichert, was the Bar examination of August, 1972 validated by any professional testing firm?

A What do you mean validated?

Q By that I mean to test whether or not the examination is job related, and I'm talking about a professional –

A I believe, Mr. Obledo, that the Supreme Court of the state has charged this Board with the testing process.

Q No, that's not responsive to my question.

JUSTICE McMANUS: He has answered.

MR. OBLEDO: Well, I would like for him to be responsive to my question, Your Honor.

JUSTICE McMANUS: Go ahead and answer.

A Well, I was not seeking to bait you, Mr. Obledo. My answer to you was candid. The Court has charged the Board of Bar Examiners with the responsibility to prepare and conduct a fair examination. I am unaware of the existence of any firm in private or public enterprise that purports to be in a position to come up with any magic mathematical study that would show anything.

JUDGE HERNANDEZ: If I may, Mr. Obledo, possibly the basis of your question, you are a Texas

Tr. 214

lawyer, passed the Texas Bar, I assume. Does Texas have such a validating procedure?

MR. OBLEDO: Not insofar as I know, Your Honor.

JUDGE HERNANDEZ: Then what was the basis of your question? Is there some validating organization that you know of?

MR. OBLEDO: Not that I personally know of, but I have been told that there are validating organizations that can validate an examination, even a Bar examination.

JUDGE HERNANDEZ: How many states validate their Bar examinations?

MR. OBLEDO: Your Honor, I don't have any of that information.

JUDGE HERNANDEZ: Then why did you ask the question?

MR. OBLEDO: Because we, as an organization, the Mexican-American Legal Defense Fund, have been advocating because of the tremendous flunk rate of the Mexican-American, We're saying that the Mexican-Americans are qualified to be attorneys and that the Bar examinations are preventing them from entering into the profession, and the Bar examination is not entirely

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job related to the performance of an attorney. Many subjects that are covered by the Bar are not necessarily used in the performance of the profession and there are other subjects that are omitted.

JUDGE HERNANDEZ: I would suggest you ask him about specific questions you believe are not job related in this examination. I think this would be a better way of getting at that, don't you?

MR. OBLEDO: Well, perhaps so, but I was wondering whether any firm had been approached to validate this examination, or whether they, themselves, set the standards under the direction of the Supreme Court.

JUSTICE OMAN: Mr. Obledo, do you know of any such firm?

MR. OBLEDO: Not personally, Your Honor; I do not.

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(Material omitted)